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Cancelling Crime

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I. INTRODUCTION

May one cancel liability for crimes already committed? In jurisdictions following the Model Penal Code ("MPC") on attempt, conspiracy, and solicitation, the answer is yes.[1] The MPC provides a defense if the actor abandons the attempt, thwarts the conspiracy, or dissuades the person solicited, under circumstances manifesting the actor's complete and voluntary renunciation of criminal purpose. The theory is not that the actor's desistance has left her short of liability for the attempt, conspiracy, or solicitation. The actor's renunciation relieves her of liability previously incurred.

The rather surprising proposition that one can erase existing criminal liability prompts two loosely related questions. First, if the MPC permits one to erase liability for attempts, conspiracies, and solicitations, why not for other crimes? Of course, no one should be able to reverse liability for a crime that necessarily entails a grave harm, such as a homicide or rape, because the harm cannot be undone. Harm is not an element of inchoate[2] offenses. An attempted murder might involve harm, such as fright to the intended victim, but it might not, such as where the would-be killer breaks off the attempt before the intended victim learns of the plan. A conspiracy is nothing more than an agreement to commit an offense; it might culminate in the target offense, or it might die on the vine. The same is true of a solicitation, which amounts to an attempted conspiracy. And yet there are many MPC offenses materially similar to attempts, conspiracies, and solicitations. A burglary requires only an unprivileged entry coupled with the

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1. *See infra* notes 13-15 and accompanying text.
2. A commonly used synonym for inchoate is "anticipatory."

purpose to commit a felony.[3] No damage need be done to the structure, no person need be home, no underlying felony need be attempted. The burglary might result in no harm whatsoever. A larceny requires only the taking of property with the purpose of stealing. The item could be replaced undamaged without the victim ever learning of the taking. There are several other MPC offenses even more closely analogous to attempts and conspiracies than burglary and larceny.[4] If the defense of renunciation is made available to attempt, conspiracy, and solicitation prosecutions, then why not for these analogous offenses?

Whether or not we extend the renunciation defense[5] to these analogous offenses, a second question arises: Should renunciation ever be a defense? This larger question calls for an analysis of the renunciation defense with reference to the general justifying aims of the criminal law. Does an actor's renunciation render him non-culpable, such that punishing him would violate the Kantian notion that we should never punish for serious offenses in the absence of culpability? Does a renunciation defense encourage attempters to desist before they cause harm, which is a form of deterrence? Does renunciation demonstrate an actor's lack of dangerousness, such that punishment would not serve any valid incapacitational goal?

I will ultimately conclude that there remains sufficient justification to punish even those who have completely and voluntarily renounced their criminal purpose in a timely fashion. In particular, I will argue that criminals who renounce are still culpable, and that the provision of a renunciation defense may actually encourage some to start down the road to crime. However, because renouncing criminals are probably less dangerous than non-renouncing criminals, I argue that a renunciation should occasion some mitigation of punishment. Such mitigation should be implemented through grading devices in indeterminate sentencing jurisdictions and through mandatory mitigation rules in determinate sentencing jurisdictions.

II. A RENUNCIATION PRIMER

I will not attempt to recount the history of the renunciation defense.[6]

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3. *See* MODEL PENAL CODE § 221.1 (1962) [hereinafter MPC].

4. *See infra* notes 45-52 and accompanying text.

5. Throughout this paper, I will use the terms "renunciation" and "abandonment" interchangeably.

6. For one historical account, see Paul R. Hoeber, *The Abandonment Defense to Criminal*

It suffices to say that the common law of crimes did not recognize a renunciation defense to any of the so-called inchoate offenses—attempt, conspiracy, and solicitation.[7] Nor did any of the pre-MPC American criminal codes recognize the defense. Under the pre-MPC law of attempt, there was no need for a renunciation defense. Generally, an actor did not incur attempt liability until he had come within "dangerous proximity" to completing the predicate offense.[8] Before that point he could always turn around, for he had not yet committed any crime. But the drafters of the MPC pushed the threshold for attempt liability back to the early stages of activity.[9] If an actor were to escape liability after advancing beyond early activity, he needed an affirmative defense—renunciation.

Section 5.01(4) of the MPC makes renunciation available as an affirmative defense to an attempt prosecution when the actor abandons his effort to commit the crime under circumstances manifesting a complete and voluntary renunciation of criminal purpose. The same provision explicitly disqualifies any actor whose renunciation is influenced by previously unknown factors that increase the probability of detection, apprehension, or failure to achieve the criminal purpose.[10] Section 5.03(6) makes renunciation available as an affirmative defense to a conspiracy prosecution if the actor foils the conspiracy under circumstances manifesting a complete and voluntary renunciation of criminal purpose.[11] Section 5.02(3) makes renunciation available as an affirma-

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Attempt and Other Problems of Temporal Individuation, 74 CAL. L. REV. 377, 379-83 (1986).

7. *See* STEPHEN A. SALTZBURG ET AL., CRIMINAL LAW 607 (1994).

8. Hyde v. United States, 225 U.S. 347, 387-88 (1912) (Holmes, J., dissenting).

9. *See* MPC § 5.01 cmt.

10. Section 5.01(4) states in full:

> Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.
>
> Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

Id. § 5.01(4).

11. MPC section 5.03(6) states in full:

> Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after

tive defense to a solicitation prosecution if the actor stops the solicited person from committing the crime under circumstances manifesting a complete and voluntary renunciation of criminal purpose.[12]

The MPC has proved influential with respect to the defense of renunciation. Since the promulgation of the MPC, twenty-six American jurisdictions have adopted an abandonment defense for attempt,[13] twenty-seven jurisdictions have adopted an abandonment defense for conspiracy,[14] and twenty-three have adopted an abandonment defense for solicitation.[15]

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conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Id. § 5.03(6).

12. Section 5.02(3) states in full:

Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Id. § 5.02(3).

13. Although the exact requirements for invoking the defense vary among jurisdictions. *See, e.g.*, ALASKA STAT. § 11.31.100(c) (Michie 1996); ARIZ. REV. STAT. § 13-1005(A) (1989); ARK. CODE ANN. § 5-3-204 (Michie 1987); COLO. REV. STAT. §§ 18-2-101(3), -401 (1986); CONN. GEN. STAT. §§ 53a-49(c), -50 (1994); DEL. CODE ANN. tit. 11, § 541(b)-(c) (1995); FLA. STAT. ANN. § 777.04(5)(a) (West 1992); GA. CODE ANN. § 26-1003 (1988); HAW. REV. STAT. § 705-530(1) (1993); IND. CODE § 35-41-3-10 (1994); KY. REV. STAT. ANN. § 506.020(1) (Banks-Baldwin 1994); ME. REV. STAT. ANN. tit. 17-A, § 154(2)(A) (West 1983); MINN. STAT. § 609.17(3) (1987); MONT. CODE ANN. § 45-4-103(4) (1995); N.H. REV. STAT. ANN. § 629:1(III)(a) (1996); N.J. STAT. ANN. § 2c:5-1(d) (West 1995); N.Y. PENAL LAW § 40.10(3) (McKinney 1987); N.D. CENT. CODE § 12.1-06-05(3)(a) (1985); OHIO REV. CODE ANN. § 2923.02(D) (Anderson 1996); OR. REV. STAT. § 161.430 (1990); 18 PA. CONS. STAT. § 901(c)(1) (1983); TEX. PENAL CODE ANN. § 15.04(a) (West 1994); WYO. STAT. ANN. § 6-1-301(b) (Michie 1997); AM. SAMOA CODE ANN. § 46.3403 (1988); P.R. LAWS ANN. tit. 33, § 3123 (1984). *Compare* ALA. CODE § 13A-4-2(c) (1994) *with* Chaney v. State, 417 So. 2d 625, 627 (Ala. Crim. App. 1982) (holding that a renunciation will not exist in situations where the defendant has travelled too far down a criminal path). *See also* State v. Latraverse, 443 A.2d 890, 895 (R.I. 1982) (abandonment defense recognized at common law).

14. *See* ALA. CODE § 13A-4-3(c) (1994); ALASKA STAT. § 11.31.120(f) (Michie 1996); ARIZ. REV. STAT. § 13-1005(A) (1989); ARK. CODE ANN. § 5-3-405 (Michie 1987); COLO. REV. STAT. §§ 18-2-203, -401 (1986); CONN. GEN. STAT. § 53a-48(b), -50 (1994); DEL. CODE ANN. tit. 11, § 541(a), (c) (1995); FLA. STAT. ANN. § 777.04(5)(c) (West 1992); GA. CODE ANN. § 26-3202 (1988); HAW. REV. STAT. § 705-530(3) (1993); IND. CODE § 35-41-3-10 (1994); KAN. STAT. ANN. § 21-3302(a) (1995); KY. REV. STAT. ANN. § 506.060(1) (Banks-Baldwin 1994); ME. REV. STAT. ANN. tit. 17-A, § 154(2)(B) (West 1983); NEB. REV. STAT. § 28-203 (1996); N.H. REV. STAT. ANN. § 629:3(III) (1996); N.J. STAT. ANN. § 2c:5-2(e) (West 1995); N.Y. PENAL LAW § 40.10(4) (McKinney 1987); N.D. CENT. CODE § 12.1-06-05(3)(b) (1985); OHIO REV. CODE ANN. § 2923.01(I) (Anderson 1996); OR. REV. STAT. § 161.460 (1990); 18 PA. CONS. STAT. § 903(f) (1983); TENN. CODE ANN. § 39-12-103(3) (1991); TEX. PENAL CODE ANN. § 15.04(b)(d) (West 1994); VT. STAT. ANN. tit. 13, § 1406 (1996); WYO. STAT. ANN. § 6-1-303(b) (Michie 1997); AM. SAMOA CODE ANN. § 46.3409 (1988).

15. *See* ALA. CODE § 13A-4-1(b) (1994); ALASKA STAT. § 11.31.110(b)(2) (Michie 1996);

III. WHY IS ABANDONMENT LIMITED TO ATTEMPT, CONSPIRACY, AND SOLICITATION?

Let us suppose for the moment that the MPC is correct to make a renunciation defense available in attempt, conspiracy, and solicitation prosecutions. If other MPC offenses are directly analogous to attempt, conspiracy, and solicitation in that harm is not an element of the offenses, then would it not make sense to make a renunciation defense available with respect to those offenses as well? There might be unique policy reasons not to extend a renunciation defense to all of these offenses, but at least the burden would shift to those who would deny such an extension.

Does the MPC recognize offenses materially indistinguishable from attempt, conspiracy, and solicitation? Before we can tackle this question, we must examine what constitutes an attempt, conspiracy, or solicitation under the MPC.

A. *What Is an Attempt?*

The MPC recognizes two different types of attempts, which I shall call "failure-type attempts" and "interruption-type attempts."[16] An actor commits a failure-type attempt when she engages in all the action she intends, but for some reason fails to achieve her criminal result. For example, *A* fires a bullet at *B*'s head, intending to kill her. The bullet misses. *A* has committed a failure-type attempt because pulling the trigger was the "last proximate act"—that is, the last act she intended to undertake.[17] She failed to achieve her criminal result only because her aim was bad.

ARIZ. REV. STAT. § 13-1005(B) (1989); ARK. CODE ANN. § 5-3-302 (Michie 1987); COLO. REV. STAT. §§ 18-2-301(4), -401 (1986); DEL. CODE ANN. tit. 11, § 541(a)(c) (1995); FLA. STAT. ANN. § 777.04(5)(b) (West 1992); HAW. REV. STAT. § 705-530(2) (1993); IDAHO CODE § 18-2003 (1997); IOWA CODE § 705.2 (1993); KAN. STAT. ANN. § 21-3303(c) (1995); KY. REV. STAT. ANN. § 506.060(1) (Banks-Baldwin 1994); ME. REV. STAT. ANN. tit. 17-A, § 154(2)(B) (West 1983); MICH COMP. LAWS. § 750.157b(4) (1991); N.H. REV. STAT. ANN. § 629:2(II) (1996); N.J. STAT. ANN. § 2c:2-6(e)(3) (West 1995); N.M. STAT. ANN. § 30-28-3(B) (Michie 1993); N.Y. PENAL LAW § 40.10(4) (McKinney 1987); N.D. CENT. CODE § 12.1-06-05(3)(b) (1985); OR. REV. STAT. § 161.440 (1990); 18 PA. CONS. STAT. § 902(b) (1983); TEX. PENAL CODE ANN. § 15.04(b)(d) (West 1994); WYO. STAT. ANN. § 6-1-302(b) (Michie 1997).

16. *See* Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, And in the Common Law*, 19 RUTGERS L.J. 725 (1988).

17. *See* MPC § 5.01 cmt. 4 (defining last proximate act as when "the actor has done all that he believes to be necessary to commit the offense in question"), *cited with approval in* United States v. Jackson, 560 F.2d 112, 118 (2d Cir. 1977).

In contrast, an actor commits an "interruption-type attempt" when she intentionally takes a substantial step toward a crime, but she either desists or is prevented from taking her last intended action. For example, *C* intends to kill *D*. *C* drives toward *D*'s house, but her car runs out of gas. She has committed an interruption-type attempt because driving toward *D*'s house constituted a substantial step toward the murder, but she was prevented from taking her last intended action (firing the gun at *D*) by the car's running out of gas. If, instead of running out of gas, *C* simply had a change of heart, turned around and went home, it would nevertheless be an interruption-type attempt. We shall say that she was interrupted by her voluntary desistance, even though this usage stretches our normal understanding of "interruption."

As noted above, the MPC criminalizes both failure-type and interruption-type attempts.[18] However, the MPC provides an abandonment defense for only interruption-type attempts and a very limited number of failure-type attempts.[19] When *C* turns around, she may invoke the abandonment defense; when *A*'s bullet misses *B*'s head, it is too late for *A* to renounce. Moreover, the vast majority of interruption-type attempts are not eligible for the abandonment defense. One may not

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18. The MPC imposes attempt liability on those who, "acting with the kind of culpability otherwise required for commission of the crime . . . purposely does . . . anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." MPC § 5.01(1)(c). The code then offers a non-exhaustive list of types of conduct that could constitute a substantial step. *See id.* § 5.01(2). Furthermore, the Code states that, "when the actor's conduct would otherwise constitute an attempt . . . it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." *Id.* § 5.01(4). A renunciation is not voluntary if "motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose." *Id.* Furthermore, the code states that "renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim." *Id.*

19. MPC section 5.01(4) states, "when the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission . . . ." Subsection (1)(b) describes failure-type attempts, while (1)(c) describes interruption-type attempts. Thus, one might interpret section 5.01(4) as authorizing a renunciation defense even in the case where the actor fires a bullet and simply misses.

The better reading of section 5.01(4), however, would restrict the renunciation defense to failure-type attempts where the actor has not irretrievably relinquished control over the harmful instrumentality—for example, where one retrieves a bomb and renounces before it detonates. If the renunciation takes place after the instrumentality has become irretrievable, then the defense should be denied.

assert the defense unless the abandonment was the product of a complete and voluntary renunciation of criminal purpose. Most interruption-type attempts are cut short by extrinsic forces, not changes of heart.[20] So it is important to understand that discussion about the abandonment defense pertains only to interruption-type attempts, and even then, only to a relatively small subset of interruption-type attempts.

B. *What Are Conspiracies and Solicitations?*

The MPC essentially defines a conspiracy as an agreement to commit (or aid the commission of) a crime with the purpose of promoting or facilitating its commission.[21] Thus, a person is guilty of conspiracy under the MPC the moment she agrees with another person to commit a crime, as long as she truly intends to commit the crime at the time of the agreement.[22]

Under the MPC, a person commits solicitation when he "commands, encourages or requests another person" to commit a crime, provided that he has the purpose of promoting or facilitating the crime.[23] Indeed, the person is guilty of solicitation even if his attempt to communicate the command, encouragement, or request is unsuccessful.[24]

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20. For examples, see *infra* text accompanying notes 82-104.

21. MPC section 5.03(1), defining conspiracy, states:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

MPC § 5.03(1).

Not all American courts define a conspiracy as an agreement. Some define it as a "combination," meaning the alliance of the parties to the agreement. For example, Professors Perkins and Boyce consider the familiar common law definition of conspiracy to be "a combination between two or more persons to accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means." ROLLIN PERKINS & RONALD BOYCE, CRIMINAL LAW 681 (3d ed. 1982). Because my critique is limited to the internal consistency of the MPC, I do not explore this divergence of authority. It might also be noted that the MPC permits a unilateral conspiracy—that is, where only one party has the total mental culpability necessary for conspiracy.

22. MPC section 5.03(5) requires an overt act in furtherance of the conspiracy, but only with respect to third-degree (relatively minor) felonies. *See* MPC § 5.03(5).

23. *Id.* § 5.02(1).

24. *See id.* § 5.02(2). Note how early this provision allows law enforcement to step in. If one views a solicitation as an attempted conspiracy, then section 5.02(2) permits conviction for an attempt to attempt to conspire.

Now that we have established what constitutes an interruption-type attempt, a conspiracy, and a solicitation under the MPC, we are ready to examine other MPC offenses to see whether they are analogous.

C. *Is Burglary Analogous to Attempt?*

Under the MPC, one commits burglary by making an unprivileged entry into a building with the purpose to commit a crime therein.[25] Unlike the common law of burglary,[26] this provision does not require a breaking or any other form of damage to the structure. In another departure from common law, the MPC does not require that anyone be in the structure at the time of the unprivileged entry. And, of course, it does not require the actual commission or even attempt to commit the target offense once inside. It criminalizes the act of entry whenever accompanied by the intent to commit any crime inside.[27]

Thus burglaries as defined by the MPC constitute a fully-included subset of interruption-type attempts, as defined by the MPC.[28] Virtually any time a person effects an unprivileged entry into a structure with the purpose of committing a crime therein, he has taken a "substantial step in a course of conduct planned to culminate in his commission of the crime."[29] The difference between the MPC burglary provision and the

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25. MPC section 221.1(1) states:

> A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

Id. § 221.1(1).

26. The common law crime of burglary consisted of breaking and entering into the dwelling house of another at night with the intent to commit a felony therein. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 792 (2d ed. 1986); PERKINS & BOYCE, *supra* note 21, at 246. Over time, American jurisdictions began to drop the breaking and nighttime requirements. Today, the trend is to define burglary simply as the entering into or remaining in a structure with the intent to commit a felony therein.

27. My point about the relative innocuousness of burglary would be even more strongly illustrated by one of the more modern burglary statutes, under which even a person walking into a retail store during business hours is guilty of burglary if she has the intent to commit a crime therein. *See, e.g.*, CAL. PENAL CODE § 459 (West 1997). Because my critique is limited to maintaining internal consistency within the MPC, however, I will stick to the MPC definition of burglary.

28. Under the typical modern burglary statute, abandoned burglaries fall into the same small subset of interruption-type attempts.

29. MPC § 5.01(1)(c). This is actually a slight overstatement; in theory, the MPC attempt provision leaves room for someone to enter a structure with the purpose of committing a crime therein and yet not have taken a substantial step toward the crime. Section 5.01(2)(d) states

MPC interruption-type attempt provision is that the latter recognizes many different types of substantial steps—reconnoitering, solicitation of an innocent agent to be used in the crime, assembling crime tools at the scene, and so on. The burglary provision recognizes only one type of substantial step—unprivileged entry into the targeted structure.[30]

The MPC burglary provision makes no mention of renunciation. But because MPC burglaries are a subspecies of MPC interruption-type attempts, it should not surprise us that the fact of renunciation has an identical moral impact on burglary and attempt liability. Consider the following hypotheticals:

> 1. *A* walks up to a sidewalk vendor with intent to steal an item. While the vendor is occupied with a customer, *A* reaches toward the item. At the last moment, he has a complete change of heart and walks away;
>
> 2. *B* walks calmly into Bloomingdale's through an open door just after closing time with the intent to shoplift an item. Two steps into the store, he has a complete change of heart and calmly walks out undetected; or
>
> 3. *C* intends to kill *D* while his back is turned. *C* raises his gun and aims it. At the last moment, he has a complete change of heart and walks away.
>
> 4. *E* intends to kill *F*, whom he knows to be sleeping in the

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that "unlawful entry of a structure . . . in which it is contemplated that the crime will be committed" shall not be held insufficient as a matter of law to constitute a substantial step. *Id.* § 5.01(2)(d). Thus, a jury is free to find that an unlawful entry did not constitute a substantial step, under the circumstances. As a practical matter, however, the entry will almost always constitute such a step.

30. Even older burglary statutes, which require a breaking, are intelligible as surrogate attempt statutes. As a historical matter, it seems clear that common law courts developed burglary to fill a perceived gap created by the "dangerous proximity" doctrine of attempt. That traditional burglary statutes are effectively attempt statutes can also be seen from their structure and relationship to other offenses. Most jurisdictions punish simple breaking and entering as a separate, general intent offense. Most traditional burglary statutes add only one more element—the intent to commit a future felony in the structure. If most jurisdictions had retained the "nighttime" requirement of common law burglary, it could be argued that burglary is a nighttime version of breaking and entering, with enhanced penalties reflecting the greater dangers of surreptitious night activity. But very few traditional burglary jurisdictions have retained the nighttime requirement. These jurisdictions could have only one rationale for a burglary offense separate from a breaking and entering offense—to supplement their attempt statutes.

upstairs bedroom. *E* calmly walks into *F*'s house through an unlocked back door and starts up the staircase. He then has a complete change of heart and calmly walks back out undetected.

In jurisdictions following the MPC on renunciation, *A* and *C* are not guilty of attempted theft and attempted murder, respectively. In jurisdictions following the MPC on burglary, *B* and *E* are guilty of burglary. This combination of results is untenable. *A* and *B* are in identical moral situations, as are *C* and *E*.

Several objections might be made against the argument that abandonment should be equally available (or unavailable) in attempt and burglary prosecutions alike. First, one might argue that burglars commit manifestly criminal acts, while attempters do not. In other words, by entering someone else's structure without privilege, a burglar undertakes acts that *look* criminal. Attempters, by merely taking a step toward some future offense, do not undertake acts that look criminal.

The problem with this objection is that it depends on the facts of the individual attempt or burglary. It is true that one may commit an attempt by engaging only in acts that appear innocuous, such as walking by the contemplated scene of the crime in broad daylight, or filling one's car with gas. But it is also true that one may commit a burglary by engaging only in innocuous behavior, such as entering a structure through an unlocked door. In the real world, most burglaries are probably pretty sinister-looking—guys in masks prying open doors or climbing through windows and skylights. But in the real world, most attempts probably look pretty bad, too—guys carrying or wearing masks, packing multiple guns into their cars, driving back and forth past banks that are about to open, and so on.[31] Whether on a theoretical or anecdotal level, the "manifest criminality" distinction fails.

The manifest criminality distinction is intimately related to another possible objection—the danger argument. Burglary creates a great danger of violence. People's houses are their castles, and many people quickly resort to violence in defense of their castles. Sometimes the law even recognizes and sanctifies this violent tendency—in the so-called "castle" exception to the retreat requirement,[32] and in statutes that

31. *See, e.g.*, United States v. Buffington, 815 F.2d 1292, 1295 (9th Cir. 1987); United States v. Jackson, 560 F.2d 112, 114-115 (2d Cir. 1977); United States v. Stallworth, 543 F.2d 1038, 1039-40 (2d Cir. 1976).

32. *See* People v. Tomlins, 107 N.E. 496 (N.Y. 1914).

presume self-defense when one defends his habitation.[33] Interruption-type attempts, on the other hand, consist of mere preparatory behavior which does not heighten the danger of violence.

The danger argument, however, suffers from the same flaw as the manifest criminality distinction. It paints with too broad a brush. Whether the actus reus of burglary or attempt creates a heightened risk of violence depends on the circumstances. A normally dressed man walking nonchalantly into a day-care center probably creates little risk of violence, even if his secret purpose is to kidnap one of the children. An ostensibly friendly neighbor—secretly intending to steal cash from the cookie jar—creates little risk of violence walking through an unlocked screen door (especially if no one is home at the time). At the other extreme, someone who raises and aims a gun at someone else creates the greatest possible danger of violence. Even a car full of guys in masks, driving back and forth in front of a bank just before opening time, creates a considerable risk of violence.

In response, it might be pointed out that not all attempted offenses are themselves violent. For example, someone who takes a substantial step toward any kind of fraud offense does not normally create an enhanced risk of violence. Certainly taking a substantial step toward tax evasion or perjury would almost never imperil anyone's physical well-being. But the same can be said of burglary. The stereotypical burglar intends to commit theft, rape, kidnapping, or murder within the structure. Entering with the purpose to commit any of these offenses would spur violence, provided that the burglar's intent was clear. But the target offense of burglary can be any crime, violent or otherwise. A person who calmly walks into his neighbor's house with the intention of furthering a check-kiting scheme or signing a false statement under penalty of perjury is guilty of burglary. Under these or similar circumstances, the act of entering a structure is highly unlikely to spur violence.

Another possible distinction between burglary and attempt might focus on the sanctity of structures. Common law burglary required a breaking, and even the MPC requires an unprivileged entry. It is true that all burglary statutes require entry into a structure of some kind, whereas no structure need be involved for attempt liability. But it would be wrong to conclude that the sole purpose of burglary law is to protect the sanctity of structures. If it were, why do burglary statutes

33. *See, e.g.*, CAL. PENAL CODE § 198.5 (West 1997).

invariably require an intent to commit a felony therein? Wouldn't a burglary statute simply say something like, "Any person who enters a structure without privilege shall be guilty of burglary"? If burglary statutes are meant to protect the sanctity of structures, they are seriously underinclusive. After all, someone who sneaks into someone else's house certainly violates its sanctity, whether or not he intends to commit further offenses once inside. I do not say that the purpose of burglary law is entirely unrelated to structures. I simply say that burglary constitutes a subspecies of attempt law limited to the context of structures.

D. *Is Theft by Unlawful Taking Analogous to Attempt?*

I will now argue that the MPC's provision on theft by unlawful taking[34] is analogous to the attempt provision, for purposes of the renunciation defense. The gist of my argument is that someone who wrongfully takes something can give it back before he consumes[35] or destroys it, thus effectively undoing the crime in the same way that renunciation undoes an attempt. In the context of theft, I shall refer to this as a "restitution" defense.

Under the MPC, "[a] person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof."[36] This provision makes an actor guilty of theft the moment he exercises unauthorized control over someone else's property with the intent to deprive. It does not require that the actor sell, consume, secrete, or destroy the property; it merely requires that he take "physical possession or control without consent or authority" while harboring the intent to deprive.[37] Like the common law and all American codes, the MPC does not recognize any renunciation or restitution defense to a theft prosecution.

It is not obvious, but this theft provision is structurally similar to the provision covering interruption-type attempts. That is, the law of theft makes a person guilty once he has taken a substantial step toward committing a target wrong. The key to seeing this similarity lies in seeing the difference between two terms—"take" and "deprive." As

34. I shall refer to this crime as larceny.

35. By "consume" I mean sell, give away, or use for personal purposes in a way that significantly depletes the value of the property.

36. MPC § 223.2(1).

37. *Id.* § 223.2 commentary at 165.

mentioned above, an actor takes when he exercises unauthorized control over property. The taking is accomplished the moment such control is established. There need not be any diminution in the value of the property to effect a taking. In contrast, an actor deprives only when he "appropriate[s] a major part of the economic value of the property" or otherwise disposes of the property "so as to make recovery unlikely."[38] In other words, deprivation under the MPC means permanent deprivation, whether of the entire item or only some portion of the value thereof.

The similarity between theft and interruption-type attempt should now be clear. *The target wrong in theft is the deprivation; the substantial step toward that wrong is the taking.* If a taking were the same thing as a deprivation, then theft would be materially dissimilar to attempt. But taking and deprivation are not the same thing. A taking is prerequisite to deprivation, but is not itself sufficient to constitute deprivation. Taking is conduct on the road to permanent deprivation, whether that deprivation is accomplished by consumption, transfer, secreting, or destruction. Thus, theft criminalizes a particular substantial step (taking) toward a target wrong (deprivation) with the intent to deprive. Structurally, this bears a strong similarity to interruption-type attempt and an even stronger similarity to burglary.

There is, of course, one obvious difference. The target crime of theft is theft. Permanent deprivation of property is not criminalized by any independent provision. This is unlike attempt or burglary, where the target crime (for example murder, rape, or theft) is independently proscribed. But this difference is immaterial to the matter of renunciation. The material similarity among theft, attempt, and burglary is that they are all "inchoate" or "anticipatory" offenses, by which I simply mean that *no necessary social harm occurs until the actor engages in the target wrong.* One can (undetected) take property without depriving the owner of it; one can (undetected) reconnoiter the scene of a contemplated bank robbery without actually robbing it; one can (undetected) enter a structure without doing any damage to or committing any crimes within. And, as long as no harm has occurred, there is time for the actor to desist and renounce.

There will be strenuous objections to this assertion about larceny and social harm. First, it will be said, the social harm of larceny is the creation of social apprehension and insecurity in property rights.

38. *Id.* § 223.2 commentary at 176.

The social harm takes place as soon as someone wrongfully takes a piece of property. This objection should look familiar, since we covered its analogue in the preceding discussion of burglary.[39] The response to this objection will also look familiar. The taking of an item may or may not cause any social harm—it depends on the particular facts of the case. I will grant that someone who steals hubcaps or hood ornaments in the middle of the day will probably create a social apprehension about the security of property, and perhaps about crime in general. But I sincerely doubt whether most larceny these days does really create such insecurity. Indeed, I would go so far as to say that such an assertion borders on naivete. Most common larceny these days probably consists of shoplifting from large retail stores. Most shoplifting probably goes undetected until the store takes inventory. I doubt that shoplifting makes managers and employees of the store feel insecure or apprehensive. The corporation takes whatever security measures are rational and writes off whatever shoplifting does take place as the cost of doing business. When someone *is* observed shoplifting, it is usually by plainclothes security people, who probably feel no apprehension about it because they are hardened to it. In the cases where other patrons detect shoplifting, some may feel insecure, but most probably turn a blind eye to it. Whether they approve of it or not, they know shoplifting happens frequently, and most probably have little emotional reaction to it.

So most larceny probably creates little or no social apprehension, and, more directly to the point, thieves are punished whether or not they have actually created any such apprehension. Two other things should be remembered as well. First, as noted previously, many interruption-type attempts probably create social apprehension. This is particularly true when the target crime is murder or armed robbery. Indeed, it is reasonable to think that many such attempts create far more social apprehension than even the worst completed thefts. Second, it is possible that restitution diminishes some or all of the social apprehension created by a theft. If people feel insecure when they hear about thefts, they may feel a little less insecure when they hear about voluntary restitutions. On the other hand, if restitution *doesn't* diminish the social apprehension created by a theft, why should we think that the abandonment of a bank robbery attempt diminishes the social apprehension it creates?

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39. *See supra* Part III.C.

The principal harm of theft is the threat to property. Recall that the MPC defines deprivation as some use that significantly depletes the property's value. After any of these events has occurred, harm has been done. The crime is no longer anticipatory. Before any of these events has occurred, however, no tangible harm has necessarily or even likely been done. If the actor promptly restores the property in its original condition, her position is morally indistinguishable from that of an attempter who has abandoned.

E. *Is Arson Analogous to Attempt?*

The MPC makes a person guilty of arson "if he starts a fire or causes an explosion" with the purpose of destroying someone else's building or destroying his own building to collect insurance.[40] Note that the provision does not require any damage to the structure. According to the MPC commentary, "the actor is guilty of arson even though the fire is extinguished before any significant damage occurs."[41] Clearly, the arson provision is structurally similar to the provision concerning attempts. The commentary makes it clear that the arson provision is intended to reach attempts: "In effect, the attempt to destroy by fire or explosion is punishable as severely as the completed offense of destruction."[42] This is consistent with the MPC's general approach of punishing attempts and completed offenses identically. The commentary goes so far as to suggest that legislatures not adopting the MPC's general attempt provisions should add the words "or attempts to start" to the arson statute.[43]

There is one strong argument against treating this arson provision the same way as interruption-type attempt. The reason is that the MPC arson provision is analogous to *failure-type* attempt, not interruption-type attempt. As we have seen, it normally makes no sense to provide a renunciation defense to someone who has engaged in the last proximate act. We would never dream of permitting someone to renounce after he had shot at his victim and simply missed.[44] And it is clear that "starting a fire" is a last proximate act. In the course of destroying a building by fire, the last act is to set the fire. Nothing more

40. MPC § 220.1(1).
41. *Id.* § 220.1 commentary at 14.
42. *Id.*
43. *Id.* § 220.1 commentary at 15.
44. *See supra* note 17 and accompanying text.

needs to be done.

Thus, in the situation where *D* sets fire to a structure but the fire goes out by itself, *D* should not be heard to "renounce." *D*'s situation is indistinguishable from the person who shot at his victim and missed. But there is one key real-world difference between the person who sets fire to a structure and the person who fires a bullet. One who pulls the trigger of a loaded handgun irretrievably relinquishes control over the situation. The bullet will now either hit or miss its target; the perpetrator has nothing more to say about it. In contrast, one who puts flame to structure has a brief period of time to reverse the course of events. Depending on the flammability of the lit surface, the arsonist may have a few seconds to extinguish the embryonic fire. The bottom line is that MPC attempt-like arsons break down into two categories—those analogous to failure-type attempts and those analogous to interruption-type attempts. Certainly no renunciation defense should be available with respect to the first kind of arson. There is, however, a strong argument for treating the second kind of arson the same way as interruption-type attempts for purposes of renunciation.

The best argument against treating arson as an interruption-type attempt is the high degree of danger involved in starting a fire. It might be argued that starting a fire in a building creates a greater danger to life and property than does a trespassory taking or reconnoitering the contemplated scene of a bank robbery. Let us assume that this is accurate as an empirical matter. Is that greater danger sufficient to rebut the presumption that interruption-type arson and interruption-type attempt should be treated similarly for purposes of renunciation? Or, to put it differently, should we deny a renunciation defense to all people who start structure fires, irrespective of any analogy to attempt law, because of the danger involved?

The answer might well be yes, were it not for the related offense of "reckless burning or exploding." Section 220.1(2) of the MPC, covering this offense, states:

> A person commits a felony of the third degree if he purposely starts a fire or causes an explosion, whether on his own property or another's, and thereby recklessly:
>
> (a) places another person in danger of death or bodily injury; or
>
> (b) places a building or occupied structure of another in danger of damage or destruction.

This, of course, is a particular type of reckless endangerment statute.

It punishes anyone who purposely starts a fire and thereby creates an unreasonable risk of harm. Unlike arson, it is not an inchoate offense.

It is best, then, to view arson as primarily an inchoate offense and reckless burning as primarily a risk-creation offense. I do not mean to deny that part of the reason for proscribing arson is the danger of starting fires. I simply mean that the principal reason for proscribing arson *separately* from reckless burning is to nip the intentional destruction of structures in the bud. The offense of reckless burning is principally aimed not at intentional destruction of structures, but at conduct that poses an unreasonable danger of destroying structures. Renunciation should be a defense to interruption-type arsons as long as it is a defense to interruption-type attempts. It should not, of course, be a defense to reckless burning.

F. *Are There MPC Offenses Analogous to Conspiracy and Solicitation?*

There are several MPC offenses containing provisions directly analogous to conspiracy and solicitation. Most of them are corruption-related offenses,[45] including: commercial bribery,[46] rigging a publicly exhibited contest,[47]

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45. There is at least one other offense that includes a provision directly analogous to conspiracy. MPC section 251.4(2) states in pertinent part: "[A] person commits a misdemeanor if he knowingly or recklessly: (a) . . . agrees to sell, deliver or provide, any obscene writing, picture, record or other representation or embodiment of the obscene . . . ." MPC § 251.4(2).

46. MPC section 224.8(1) states:

> A person commits a misdemeanor if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as:
>
> (a) partner, agent, or employee of another;
>
> (b) trustee, guardian, or other fiduciary;
>
> (c) lawyer, physician, accountant, appraiser, or other professional adviser or informant;
>
> (d) officer, director, manager or other participant in the direction of the affairs of an incorporated or unincorporated association; or
>
> (e) arbitrator or other purportedly disinterested adjudicator or referee.

Id. § 224.8(1).

47. MPC sections 224.9(1)-(2) state:

> (1) A person commits a misdemeanor if, with purpose to prevent a publicly exhibited contest from being conducted in accordance with the rules and usages purporting to govern it, he:
>
> (a) confers or offers or agrees to confer any benefit upon, or threatens any injury to a participant, official or other person associated with the contest or exhibition; or
>
> (b) tampers with any person, animal or thing.
>
> (2) Soliciting or Accepting Benefit for Rigging. A person commits a misdemeanor if he knowingly solicits, accepts or agrees to accept any benefit the giving of which would

bribery,[48] compensation for past official action,[49] gifts to public servants,[50] compensating a public servant,[51] and "compounding" (taking money not to report a crime).[52]

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be criminal under Subsection (1).

Id. § 224.9(1)-(2).

48. MPC section 240.1 states:

> A person is guilty of bribery, a felony of the third degree, if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another:
>
> (1) any pecuniary benefit as consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or
>
> (2) any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or
>
> (3) any benefit as consideration for a violation of a known legal duty as public servant or party official.
>
> It is no defense to prosecution under this Section that a person whom the actor sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

Id. § 240.1.

49. MPC section 240.3 states:

> A person commits a misdemeanor if he solicits, accepts or agrees to accept any pecuniary benefit as compensation for having, as public servant, given a decision, opinion, recommendation or vote favorable to another, or for having otherwise exercised a discretion in his favor, or for having violated his duty. A person commits a misdemeanor if he offers, confers or agrees to confer compensation acceptance of which is prohibited by this Section.

Id. § 240.3.

50. MPC section 240.5 is divided into four subsections according to the type of official involved. Subsection (1) is representative of the other three subsections:

> Regulatory and Law Enforcement Officials. No public servant in any department or agency exercising regulatory functions, or conducting inspections or investigations, or carrying on civil or criminal litigation on behalf of the government, or having custody of prisoners, shall solicit, accept or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation or custody, or against whom such litigation is known to be pending or contemplated.

Id. § 240.5.

51. MPC section 240.6(1) states:

> Receiving Compensation. A public servant commits a misdemeanor if he solicits, accepts or agrees to accept compensation for advice or other assistance in preparing or promoting a bill, contract, claim, or other transaction or proposal as to which he knows that he has or is likely to have an official discretion to exercise.

Id. 240.6(1).

52. MPC section 242.5 states:

> A person commits a misdemeanor if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.

It is critical to understand that the relevant portions of these offenses are all inchoate in nature. For example, one is guilty of commercial bribery the moment one solicits or agrees to accept any benefit as consideration for breaching a fiduciary duty. It is not necessary for the actor actually to breach the duty or even actually to accept the benefit. One merely needs to have asked for or agreed to accept the benefit. The actus reus of these forms of commercial bribery are the request or agreement, making them every bit as inchoate as solicitations and conspiracies under the general MPC provisions. The same could be said of any other offense on the above list.

Unlike solicitations and conspiracies under the general MPC provisions, however, no renunciation defense is available with respect to these corruption-related offenses. Why should we treat solicitations and conspiracies under the general MPC provisions differently from these corruption-related solicitations and conspiracies? It cannot fairly be said that general conspiracies must be treated differently from the corruption-related conspiracies on the ground that the general conspiracy provision draws the line of criminality at such an early stage. As we have just seen, all the corruption-related conspiracies are just as anticipatory as general conspiracy. They all draw the line at the earliest possible stage.

Another argument for denying a renunciation defense to the corruption-related solicitations and conspiracies is that they are only misdemeanors. One could point to the existence of many misdemeanors that require no mental culpability. It is generally thought that, because the punishment of misdemeanors involves only monetary fines or de minimis deprivations of liberty, strict liability is acceptable.[53] We may not want people accused of misdemeanors to drag prosecutors through the evidentiary difficulties of proving mens rea. Along those lines, it might be argued that those accused of misdemeanors should not be permitted to subject the proceedings to the complications raised by a renunciation defense. Whatever the merits of this argument, it apparently was not embraced by the drafters of the MPC. Under the general solicitation and conspiracy provisions of the MPC, it is possible to be guilty of soliciting a misdemeanor or conspiring to commit a misde-

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Id. § 242.5.

53. *See, e.g.*, Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 82 (1933) ("It is fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him the opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent.").

meanor. Moreover, the renunciation defense applies without restriction to all solicitations and conspiracies, even when the target offense is a misdemeanor. It would be inconsistent for the MPC to deny a renunciation defense to the corruption-related solicitation and conspiracy prosecutions on the ground that they are misdemeanors when the MPC makes the defense available to those who are prosecuted for general solicitations to commit target misdemeanors or general conspiracies to commit target misdemeanors.[54]

The best argument for denying a renunciation defense to the corruption-related solicitation and conspiracy analogues is that they are all aimed at abuses of trust.[55] It has often been said that, in dealing with positions of trust, the appearance of propriety is as important as propriety itself.[56] A legislator may renege on her agreement to cast a vote in exchange for money. She may even return the money. But, it will be argued, the mere fact that she agreed to swap her vote for money in the first place will damage public confidence in the legislative process.

This last assertion is an empirical one. Common sense tells us that public confidence will be diminished by corruption. But is public confidence diminished by aborted attempts at corruption, as in our hypothetical? Does the public believe that a legislator who reneges on one bribery transaction is probably guilty of having gone through with others? Alternatively, does the public believe that, although this particular legislator may be clean, the very agreement itself signals the likelihood that other legislators are taking bribes? Or, on the other hand, does the aborted bribery transaction make the public think that other legislators are also capable of standing up and doing the right thing? I know of no empirical studies on these precise questions.

My own intuition is that virtually any news about legislators and the legislative process tends to diminish public confidence. Americans seem mired in a deep cynicism about their government, and the only thing that seems to alleviate this cynicism is to "throw the rascals out"—whereupon the cycle repeats itself. If my intuition is correct, we might be best off ignoring the short-term effects of individual bribery transactions on public confidence. Between elections, public confidence will always decline, and it will always increase immediately following

54. It is also worth noting that one of the corruption-related solicitation and conspiracy analogues—bribery in official and political matters—is a felony. *See* MPC § 240.1.

55. Commercial bribery, of course, does not involve the public trust.

56. *See, e.g.*, Fleischer v. A.A.P., Inc., 163 F. Supp. 548 (S.D.N.Y. 1958) (regarding attorney conflicts); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980).

elections. In the long run, whether we punish incomplete corruption schemes or not will probably have little effect on the popular foundations of American government.

But I will not rest my analysis on these loose impressions about the vicissitudes of public opinion. Rather, I will stick to insisting on internal consistency within the MPC. If the anti-corruption offenses listed above omit renunciation defenses in deference to public opinion, then they are inconsistent with the MPC's treatment of perjury. Section 241.1(4) states: "Retraction. No person shall be guilty of [perjury] if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding."[57] This provision, of course, is conceptually indistinguishable from a renunciation defense to attempt, conspiracy, or solicitation. It permits someone who has committed a completed offense of perjury to erase her liability by retracting the falsehood in a timely manner. The notion is that the retraction avoids serious harm so long as it comes before the falsehood "substantially affect[s] the proceeding." If the framers of the MPC had believed that the very utterance of a falsehood presumptively causes great harm to the integrity of judicial proceedings, they would not have created a retraction defense to perjury.

My personal opinion is that the MPC is right on this score; I doubt that any great harm is done until the falsehood is acted upon. But that is beside the point. The MPC clearly does not deny a retraction defense to perjurers out of a felt necessity to protect the integrity of the judicial process. It would be inconsistent for the MPC to deny a renunciation defense to bribe conspirators in order to protect the integrity of the political process. In sum, there is no good reason not to treat conspiracy under section 5.03 and the anti-corruption conspiracy analogues identically for purposes of renunciation.[58]

IV. SHOULD ABANDONMENT BE EXTENDED TO ANALOGOUS OFFENSES?

To this point, I have argued only for symmetry. I have not per se argued in favor of recognizing a renunciation defense for any crime,

57. MPC § 241.1(4).

58. Of course, we might reject the MPC's position on the retraction of perjury, in which case we might also deny the renunciation defense to corruption-related solicitations and conspiracies. As a response, I refer the reader to my discussion in Part III, *infra*.

nor have I opposed it. I have simply demonstrated that those who renounce after committing burglaries, who return property before consuming or damaging it, and who extinguish structure fires before any significant damage occurs are morally indistinguishable from those who abandon interruption-type attempts. I have also shown that those who renounce bribery and other corrupt solicitations and conspiracies are morally indistinguishable from those who renounce other types of solicitations and conspiracies. If we desire internal consistency, we are left with two obvious options: (1) extend the renunciation defense to burglary, larceny, interruption-type arsons, and the anti-corruption solicitation and conspiracy analogues; or (2) abolish renunciation and retraction as defenses to attempt, conspiracy, solicitation, and perjury prosecutions.

There are several arguments in favor of recognizing a renunciation defense. One is that a true renunciation negates the actor's culpability. A second is that recognizing a renunciation defense encourages actors to desist before causing harm. Still another is that those who completely and voluntarily renounce their criminal purpose are no more dangerous than the general population. I will examine each of these in turn.

A. *The Culpability Principle*

It is often said that there exists a principle of criminal law prohibiting punishment in the absence of culpability. Sometimes the principle is attributed to Immanuel Kant, who believed that no one should be punished who does not deserve it.[59] There are seeming exceptions to this principle in our criminal law, but they can be explained away. All modern American criminal codes contain a great many regulatory offenses that require no mens rea. This fact is reconciled with the culpability principle on the ground that monetary fines or license revocations do not constitute "punishment" in the same sense that imprisonment does. The vast majority of American jurisdictions retain the "felony-murder" rule, which punishes killings during crime on a strict liability basis.[60] This fact might be reconciled with the culpability principle on the ground that the predicate felony always requires proof of intent.

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59. *See* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 302 (1996); W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 922-23 (1996).

60. Only a few states have abolished the felony-murder rule. *See, e.g.*, People v. Aaron, 299 N.W.2d 304, 312 (Mich. 1980).

Reasonable criminal law scholars may differ on the exact degree to which modern American criminal law actually observes the culpability principle.[61] But the principle seems largely accurate as a descriptive matter, and it seems a worthy aspiration.[62]

In any event, let us provisionally assume that society ought not punish in the absence of culpability. It now becomes essential for us to inquire whether a valid renunciation somehow negates an actor's culpability. For if renunciation does negate culpability, then the criminal law must recognize renunciation as a complete defense. It would not even matter whether renunciation would encourage desistance or whether actors who renounce are more dangerous than the general population.

Larry Alexander and Kimberly Kessler would go even further than the proposition that a renunciation negates culpability.[63] They argue that someone who engages in an interruption-type attempt is not culpable at all until she performs the last proximate act.[64] For example, if *A* were to aim her gun at *B* with the intention of killing, Alexander and Kessler would say that *A* has not yet engaged in a culpable act. Only when *A* pulls the trigger—thereby unleashing a force beyond her control—has she done something culpable. If Alexander and Kessler are right about this, then interruption-type attempts should not be punished at all (a result which they advocate). Presumably, under their reasoning, burglary would be abolished[65] and larceny would be punished only when the actor actually consumed the property.

Alexander and Kessler reason that the act of forming an intention to commit the target offense is not itself a culpable act because the actor can always reconsider. "We always know that our intentions may be changed up to the point of acting on them," according to Alexander and Kessler.[66] "It follows from this that it is only at the point where the actor has truly relinquished control, not at the point where he forms

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61. *See, e.g.*, John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111 (1996) (arguing that the general characterization of criminal law as requiring individual culpability is overstated).

62. The MPC certainly treats culpability as a key to identifying those actors worthy of punishment. *See, e.g.*, MPC § 2.02 (general provision regarding mental culpability).

63. *See* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY (forthcoming 1997).

64. *See id.*

65. Although the lesser included offense of breaking and entering would remain on the books.

66. Alexander & Kessler, *supra* note 63.

the intention, that he has committed a culpable act."[67] For it is not until the actor has relinquished control that she has created any danger, they argue.

The Alexander and Kessler position appears to be based on a strained definition of culpability. They assume that an act cannot be culpable unless it creates danger of social harm. But it is not clear why culpability ought to be linked to actual danger of social harm. Culpability denotes blameworthiness. A culpable act is any act that deserves the moral condemnation of society. Moreover, the formation of an intention is itself a voluntary act, as Alexander and Kessler acknowledge.[68] If we can agree that the formation of an intention to commit a *malum in se* crime deserves moral condemnation, then it in itself is a culpable act.

Against Alexander's and Kessler's insistence that an actor commits no culpable act until he engages in the last proximate act, then, I would argue that he has committed a culpable act merely by forming the intent to commit a crime. Of course, this does not mean that I advocate criminalizing mere intentions. The person intending to commit a crime must take a substantial step toward the commission of the offense. A substantial step is required not because it constitutes a first culpable act, but because there are strong policy reasons not to punish thoughts alone. It is too difficult to prove intentions without any acts in furtherance thereof.[69] Punishing intentions alone would also give law enforcement too much license in probing our thought processes. Privacy would suffer. So the formation of intent to commit crime, while culpable in itself, should only be punished when accompanied by physical acts in furtherance thereof. My point is simply that when an act is culpable and when an act ought to be subject to punishment are two different inquiries.[70]

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67. *Id.*

68. *See id.*

69. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *21.

70. Gerald Dworkin and David Blumenfeld have also made an argument which, if correct, would mandate the elimination of all interruption-type attempt liability. They have argued that the line between intention and various other mental states—fantasy, wish, desire—is too hard to draw, as a practical matter. These mental states are simply points on a continuum, "making it a rather hazy matter to know just when a person is intending rather than wishing." Gerald Dworkin & David Blumenfeld, *Punishment for Intentions*, 75 MIND 396, 401 (1966). It should be understood that Dworkin and Blumenfeld's objection is not metaphysical, but epistemological. They do not claim that there is no difference between a wish and an intention. They would acknowledge a distinction between a vague desire that someone die and a firm resolution to kill that person. What they doubt is our ability reliably to discern the two.

We have seen that there is culpability in an interruption-type attempt. We now turn to the original question: Does a valid abandonment negate that culpability? It now seems clear that the answer is no. The culpable act is the formation of the intent to commit a crime, and that act cannot be erased.[71] It is true that the actor can subsequently engage in redeeming acts, such as to accept responsibility, to express remorse, and completely and voluntarily to renounce criminal purpose.[72] But subsequent acts do not erase prior ones. The actor is worthy of blame for the bad act and worthy of praise for the good ones. All of us have long lists of good and bad acts. When we die, society may net those acts out and make cumulative moral judgments about the lives we have led. The criminal law, however, is not concerned with the moral totality of our lives. It concerns itself with one act at a time.[73]

Not only do they doubt that law enforcement or a finder of fact can reliably tell the two apart, they doubt that the person himself can always tell them apart. *See id.* at 401 ("Am I only wishing my mother-in-law were dead? Perhaps I have gone further.").

One need not disagree with the crux of Dworkin's and Blumenfeld's insight to conclude that it poses no threat to modern interruption-type attempt liability. The difficulty of distinguishing among fantasies, desires, and intentions counsels against the criminalization of intentions alone. If we were to punish the bare formation of an intention to kill, we would almost certainly end up punishing some people who had never gone beyond a simple wish or fantasy about another person's death. Indeed, it would create a tremendous potential for police abuse and corruption. But modern attempt statutes do not come anywhere close to punishing intentions alone. (Conspiracy statutes may be a different matter.) They require the actor to take a substantial step toward the commission of the offense while harboring an intention to commit it. Someone who lays in wait, reconnoiters a potential crime scene, or assembles weapons at the scene has likely gone beyond the wishing stage. Someone who acts out her thoughts to such an advanced degree has probably developed a firm resolution to commit the offense. She may yet change her mind, but at the time she engages in one of these acts, she probably has resolved to see the plan through.

It might be objected that "probably" ought not be considered good enough for a system of criminal justice in a liberal society. Someone who lays in wait has probably decided to commit the murder, but may only have resolved to keep her options open. I need not take a position on this objection. The threshold for interruption-type attempt liability has changed over the centuries, starting with only those attempts that had advanced to a very mature stage and gradually moving back to liability at a relatively early stage. It might be perfectly sensible to conclude that we have gone too far, that the threshold ought to be moved back closer to a "last proximate act" requirement. This would ensure that very few people would be convicted of attempt on the basis of mere wishes or desires. I express no opinion on this question. The point is simply that moving back the threshold of attempt liability answers any reasonable version of the Dworkin and Blumenfeld objection. It would not be necessary to eliminate all interruption-type attempt liability.

71. For a similar view, see Hoeber, *supra* note 6.

72. *See id.* at 400-02.

73. I am indebted to Kate Bloch for reminding me of this.

Let me be clear about what I do *not* mean by this. I do not mean that a person's other good and bad acts are never relevant to the question of punishment. A convict's good deeds may be taken into account at the times of sentencing and parole. On the other hand, his prior convictions may serve as the predicate for recidivist liability. These other acts may bear on the person's dangerousness and overall suitability for incapacitation or release into the general population. But it would be incorrect to say that, at the time of determining guilt, the actor is no longer culpable on the ground that she has renounced her criminal purpose. It would be incorrect to say that punishment for an abandoned inchoate offense constitutes punishment in the absence of culpability.

Although I conclude that punishment for abandoned crimes does not violate the culpability principle per se, it is important to acknowledge that abandonment nonetheless bears on the retributive value of punishment. One who has firmly resolved to commit murder and then completely and voluntarily renounces all such intention may still deserve our moral condemnation, but surely not to the same degree as one who has never renounced. At this stage of the argument, it is unnecessary to specify whether the recognition of renunciation belongs at the grading or sentencing phase. It is enough to note that the concept of retribution supplies us with a reason for some mitigation of punishment where abandonment is concerned.

B. *Influencing Conduct*

Another potential reason for recognizing renunciation as a mitigating factor is to encourage desistance. The MPC commentary states that an abandonment defense "provide[s] actors with a motive for desisting from their criminal designs, thereby diminishing the risk that the substantive crime will be committed."[74] Let us examine this assertion.

Assume *A*, a two-time loser, intends to rob a bank. He takes a substantial step toward that crime—say, by procuring a gun and mask and by reconnoitering a bank. If he succeeds, he knows that he will come away with a large sum of money, probably to be used on drugs. If he fails, he knows he will receive a significant prison term. He still has time to abandon the robbery.

In a jurisdiction that does not follow the MPC on renunciation, he does not have the incentive of a renunciation defense. But he has a

74. MPC § 5.01 cmt 8, at 359.

much more attractive incentive to renounce: if he does it now, there is a good chance he will never be caught. To be sure, he has committed an attempted bank robbery for which he has no defense. But until someone actually sees him with the mask on, he probably won't be detected.[75]

It should be noted that the MPC punishes attempts the same as completed offenses.[76] Without a renunciation defense, it could be argued, the actor will reason that she might as well complete the crime and get the benefits. She will be punished the same in any event. But the fact that attempts are punished identically to completed offenses is irrelevant from the perspective of the actor who has gone far enough to be guilty of an attempt, but who is not yet in any danger of being detected. From that person's perspective, the incentive to desist is that he will probably never be caught. Knowledge that a renunciation defense awaits him gives him no additional reason to desist.

Besides—and this is the main point—if he desists for any reason, *he has no chance at the money.* He will still be unable to feed his drug habit. He will be right back where he started. He could have achieved the same result by simply not taking the substantial step in the first place.

This point deserves further explanation. To see why a renunciation defense cannot serve as an incentive to desist, we must remember why an actor starts down the road to crime in the first place. At the time he takes the first step toward an offense, the actor is well aware that he runs the risk of punishment should he be caught. He has decided that the prospect of success outweighs the risk of punishment. Whether the reward is money, revenge, elimination of an eyewitness to a previous crime, or anything else, the actor has decided that the prospect of achieving this objective is worth the chance of being caught and punished. Thus, he moves forward. Once he has taken a substantial step toward his objective, the law of renunciation offers him the following deal: turn back now and you won't be punished, even for the attempt you have already committed.

How will the actor react to this offer? Let us analyze the substance of the proposed deal. If the actor desists, he will avoid all punishment. He will also forego all chance of achieving his objective. This, of course, is exactly the deal he rejected before he undertook his

75. Once the actor comes into danger of apprehension, it is too late for him to claim the renunciation defense.

76. *See* MPC § 5.05(1).

first preparatory act. He could have avoided all risk of punishment by taking no steps toward the crime. He started down the road precisely because he thought the prospect of success outweighed the risk of punishment. The criminal law now renews its offer of no punishment in exchange for the actor's giving up on achieving his objective, *yet nothing has changed.*[77] Why should his decision change?

Of course, if material circumstances change between the time he starts down the road and when he completes a substantial step, his decision might well change. If a police officer showed up just after he had completed a substantial step, or if he found the bank vault more complicated than he expected, if he found the vault empty, he would quite eagerly accept the quid pro quo of desistance-for-no-punishment. Unfortunately for him, the law of renunciation does not extend to any of these situations. The renunciation is not deemed "voluntary" if it is "motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose."[78] In short, renunciation offers the actor the exact same deal he has already rejected. If anything changes to make the deal more attractive to the actor after he has taken a substantial step, the offer is revoked. This is why the law of renunciation cannot possibly serve as a positive inducement to desistance.

As should now be plain, it is the "voluntariness" requirement that prevents the renunciation defense from ever serving as encouragement to desist. As defined by the MPC, a renunciation is not "voluntary" unless it reflects a true change of heart on the actor's part. But if an actor takes a substantial step toward commission of the target offense and then has a true change of heart, wouldn't she be inclined to renounce whether or not she receives a defense for it? If we posit a true change of heart, why would the actor ever go through with the plan? It would make no sense for the actor to think, "I've decided robbing banks is wrong, but since they won't give me a renunciation defense, I might as well go through with it." One could almost go so far as to say that any actor who considers a renunciation defense the critical

77. Of course, one thing has changed: he has now committed an attempt. But that is irrelevant from the standpoint of the actor's decision-making process. He knew from the start that, at some point along the road to his objective, he would become guilty of an attempt. It is impossible to commit a crime without also committing an attempt. The fact that he has now committed the attempt does not alter his balance of reasons.

78. MPC § 5.01(4).

factor in deciding to renounce has not had a "complete and voluntary renunciation of criminal purpose."[79] At least there is a tension between the supposedly altruistic nature of a valid renunciation and the self-interested incentive of a defense.

There is another consequentialist argument against recognizing an abandonment defense. It might reduce the deterrent effect of the criminal law. It might embolden otherwise ambivalent actors: "I wasn't sure about robbing a bank, but I went ahead and got the gun and mask because I knew I could always turn around." The availability of a renunciation defense cannot entice people to take steps toward crime if they have no interest in committing crimes in the first place. But those who harbor some interest in committing crimes may decide that the renunciation defense effectively buys them more time to think. We have only to look at the ages-old marketing ploy of money-back guarantees. The money-back guarantee induces ambivalent buyers to purchase products on the rationale that parting with their money is not irreversible. They can always decide to turn around later (though inertia usually stops them from doing so).

C. *Dangerousness*

In recent years, incapacitation has gained favor as a justification for punishment. The perceived failure of rehabilitation, the empirical uncertainties of deterrence, and the barbaric image of retribution may have contributed to the popularity of incapacitation as a punishment rationale.[80] The MPC commentary states that "renunciation of criminal purpose tends to negative dangerousness,"[81] meaning that incarceration is less needed for those who renounce. If this statement is correct, then we will have identified a major reason for recognizing an abandonment defense.

The question is whether attempters who abandon are significantly less dangerous than attempters who do not abandon.[82] It must be emphasized from the outset that assessing dangerousness is a guessing

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79. *Id.*

80. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 3-5 (1995) (explaining the factors behind the increased popularity of incapacitation as a punishment justification).

81. MPC § 5.01 cmt. 8, at 359.

82. "Dangerous" could be defined in at least two ways. It might refer to the risk that a defendant released into society would commit the same type of offense, or it might refer to the risk that the defendant would commit any offense. I will use "dangerous" in the first sense.

about who would commit what crimes in the future.

If one must attempt to predict human behavior, the rational course is to look at past performance. We would want to examine the post-release behavior of a large group of people who had abandoned attempts. We would want to note whether and how often they committed crimes. We would probably want to break the group down into categories based on the circumstances surrounding their renunciations. People who renounced on the basis of, say, sudden religious conversions may have committed more or fewer subsequent crimes than people who renounced out of secular shame. We would certainly want to know the prior criminal histories of those who abandon attempts. Those who renounced attempts after long criminal histories might be more likely to commit future crimes than those who abandon their first criminal activity. Surely we would also want to know how attempted murderers who renounce compare to attempted rapists, burglars, and robbers who renounce.

Regrettably, there are overwhelming problems in conducting such empirical research. Many have conducted studies regarding recidivism, but all the studies contain major methodological flaws. Professors Frank Zimring and Gordon Hawkins have enumerated these problems in their recent book on incapacitation.[83] So it is practically impossible to

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83. *See* ZIMRING & HAWKINS, *supra* note 80, at ch. 5. Anyone interested in the methodological problems should read the Zimring and Hawkins work, but I will attempt to summarize some of those problems.

The primary documentation for estimates of incapacitation in the United States is a series of surveys of incarcerated prisoners who are asked to describe the kind and amount of crime they committed in a certain period of time prior to their incarceration. *See id.* at 81. Based on this data, the researcher estimates the amount of crime that was prevented by the incarceration. There are three problems with such surveys.

First, are the measures accurate? Research indicates that prisoners tend to overestimate the amount of their criminal activity for specific periods of time because their memories of crimes committed in previous time periods run together. Another problem is annualization. If a prisoner was only on the streets for three months in a given study year, should the researcher simply multiply that person's crime total by four to achieve the "annual rate?" *See id.* at 82.

Second, are the projections appropriate? All the respondents in prisoner surveys have been caught. If the people who are most likely to be caught are the people who commit the most crimes, studies may overestimate the amount of crime avoided by incarceration. To illustrate this phenomenon, let us assume that the average prisoner committed ten crimes in the year prior to incarceration. Let us further assume that criminals who have managed to evade incarceration commit an average of five crimes per year. (In other words, assume that the people currently in prison are the most criminally active.) Studies based on existing methodology will estimate that ten crimes per year will be prevented by each additional incarceration, when in fact only five crimes will be prevented. *See id.* at 83-84.

base our assessment of dangerousness on hard data.

We are left with two options—go with our considered intuitions about the dangerousness of attempters who abandon, or refuse to draw any conclusion at all with regard to dangerousness. The practical effect of the latter route, of course, would be to reject the MPC's assertion that renunciation negates dangerousness. This, in turn, would weigh heavily against the recognition of renunciation as a full defense or as a basis for mitigation. But refusing to reach any conclusion about dangerousness would be irrational and unfortunate. In the absence of reliable empirical data tending to prove or disprove any particular proposition, we should decide based on our considered intuitions, unless there is some reason to believe that our intuitions on the matter are systematically biased.

For example, assume there is no reliable empirical evidence to prove or disprove the proposition that the off-field behavior of famous athletes affects the behavior of elementary school age children. Assume also that we have a strong intuition that there is some causal relationship between the two. Should we ignore the possibility that the athletes' behavior is influencing children's behavior? It would be irrational. Of course, there may be other reasons not to do anything about the athletes' behavior—a desire not to interfere with the athletes' privacy or fear of governmental overreaching, for example. My point is simply that it makes no sense to ignore our considered intuitions unless we have reason to believe them biased. If the question at issue was whether our generation should preserve a greater share of resources for future generations, there would be good reason to distrust our intuitions on the matter. We are too self-interested. But in the absence of some such bias, our considered intuitions must be worth something.

What, then, *are* our considered intuitions about the relative dangerousness of attempters who renounce and attempters who do not? It would be easy to draw forth some quick impressions about the suspicious nature of criminal "conversions" and the incorrigibility of criminal depravity. The critical fact, however, is the judicial test for what

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Third, prisoner surveys cannot gauge the level of "substitution." For example, even if one member of a drug ring is incarcerated, the other members of the ring may well continue to commit drug and drug-related offenses. Let us assume that an incarcerated ring member reports that he committed 100 offenses in the year prior to imprisonment. Researchers will conclude that his incarceration has prevented 100 offenses the following year when in fact the remaining members of the ring may have committed some or all of the offenses in his absence. *See id.* at 85-86.

constitutes a "complete and voluntary abandonment of criminal purpose." The courts have consistently rejected renunciation defenses in cases where the defendant desisted from further criminal conduct because he feared that he had been detected, because he thought there would be a more propitious moment in the future, or because he had second thoughts about his victim selection. This is entirely consistent with the MPC comments. Indeed, the very reason there have been so few cases where abandonment defenses have been upheld is that the doctrine effectively requires a complete and genuine moral conversion by the defendant. Moreover, judges have shown a determination to enforce that requirement strictly.

In *People v. Staples*,[84] the defendant was a mathematician whose wife had gone on a trip. He rented a second-floor office in a commercial building directly over the vault of a first-floor bank. Before the rental period began, the landlord had ten days to finish some interior repairs and painting. During this time the defendant brought equipment into the office—"drilling tools, two tanks of acetylene, a blow torch, a blanket, and a linoleum rug."[85] One Saturday when no one was around, the defendant drilled two groups of holes into the office floor. He stopped before the holes went all the way through. In his written confession, the defendant explained why he stopped:

> Because of tiredness, fear, and the implications of what I was doing, I stopped and went to sleep.
>
> At this point I think my motives began to change. The actutal [sic] commencement of my plan made me begin to realize that even if I were to succeed a fugitive life of living off of stolen money would not give the enjoyment of the life of a mathematician however humble a job I might have.
>
> I still had not given up my plan however. I felt I had made a certain investment of time, money, effort and a certain pschological [sic] commitment to the concept.
>
> I came back several times thinking I might store the tools in the closet and slowly drill down (covering the hole with a rug or linoleum square). As time went on after two weeks or so). My wife came back and my life as a bank robber seemed more and more absurd.[86]

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84. 85 Cal. Rptr. 589 (Cal. Ct. App. 1970).
85. *Id.* at 590.
86. *Id.* at 590-91.

had gone far enough toward the burglary to be guilty of an attempt. The court of appeals also held that the defendant did not qualify for any abandonment defense:

> Usually the actors in cases falling within that category of attempts are intercepted or caught in the act. Here, there was no direct proof of any actual interception. But it was clearly inferable by the trial judge that defendant became aware that the landlord had . . . turned defendant's equipment and tools over to the police. This was the equivalent of interception.[87]

In *United States v. McDowell*,[88] the defendant negotiated a deal to buy cocaine from what turned out to be two undercover government agents. The agents told the defendant they "wanted to see the money before bringing the cocaine into the room."[89] The defendant insisted on examining the cocaine before showing them the money. The agents brought in two packages of fake cocaine and told him he could examine the packages but not test the cocaine until they saw the money. The defendant examined the packages and said, "This does not look like anything I ever done before. I don't want to buy it."[90] He was later arrested for and convicted of attempt to possess cocaine with intent to distribute. The court of appeals affirmed his conviction, stating that the defendant "spurned the deal not to renounce his criminal intent but because he doubted either the genuineness or quality of the cocaine."[91]

In *United States v. Bailey*,[92] the defendant was charged with one count of "corruptly endeavoring to influence a juror."[93] The trial was a highly publicized federal criminal prosecution. One of the defendant's neighbors was on the jury. Just as the case was about to go to the jury, the defendant went to the juror's apartment and said, "Name your price. Name your figure."[94] Later that evening, the defendant made a phone call to the juror in which she asked the juror whether she had

87. *Id.* at 594. Alternatively, the court held that California law did not recognize an abandonment defense. *See id.*

88. 705 F.2d 426 (11th Cir. 1983).

89. *Id.* at 427.

90. *Id.*

91. *Id.* at 428.

92. 834 F.2d 218 (1st Cir. 1987).

93. *Id.* at 220.

94. *Id.*

phone call to the juror in which she asked the juror whether she had "thought about it."[95] The juror's response to each of these overtures was "along the lines of 'you've got to be kidding.'"[96] The next morning, the juror telephoned the defendant and told her, "No way, shape, or form."[97] The juror then added that the defendant "would be in serious trouble once the judge learned of her proposition."[98] The defendant responded, "I know, I didn't sleep all night over it."[99] The juror interpreted this remark as the defendant backing away from the proposal, "but it was too late then."[100]

The First Circuit assumed for the sake of argument that a valid abandonment would constitute a defense to a charge of corruptly endeavoring to influence a jury.[101] This defendant, however, did not qualify. Her apparent remorse—"I didn't sleep all night over it"—was "far from a complete renunciation of her criminal purpose," according to the court.[102] The sleeplessness remark was elicited by the juror's warning that she would be "in trouble" once the bribe came to light. "The full exchange suggests [defendant] may have been overcome by a fear of apprehension, rather than the genuine change of heart the abandonment defense is designed to encourage," the court observed.[103] "Indeed, nothing in [the defendant's] language suggests that the offer was not still open," the court added. "And [the juror's] sense that [the defendant] was 'backing off' is similarly ambiguous. The complete renunciation required by this defense would need much more."[104]

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95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* at 226.
100. *Id.* at 227.
101. The court stated:

> We express no view whether abandonment is a viable defense for a violation of this statute. Arguably, Congress's criminalization of the act of "endeavoring" to influence a juror should be taken at face value: once the endeavor has been made the crime is complete. Moreover, it is arguable that an "endeavor" is less purposeful than an "attempt," and that the law should only recognize abandonment as a defense to the latter. On the other hand, the policy underpinning the abandonment defense—providing an incentive for the repudiation of incipient criminal acts—is identical in both cases.

Id. at 227 n.7 (citation omitted).
102. *Id.* at 227.
103. *Id.*
104. *Id.* Arguably, the court did not need to analyze the conduct constituting the supposed abandonment. One might argue that the defendant in *Bailey* was charged with the equivalent of a failure-type attempt, not an interruption-type attempt. The communication of the bribe

What these cases show is that the courts have uniformly insisted on nothing less than a genuine moral conversion to establish a valid abandonment. And where the actor desists from a target crime based on a genuine moral conversion, intuition strongly suggests that he is significantly less likely to commit the target crime in the future than an attempter who does not renounce. It would go too far to say that such abandoning attempters are no more dangerous than members of the general public. Some moral conversions prove durable; others wash out almost instantly. But the point is that there are two comparison groups here—attempters who do not renounce and members of the general public. If attempters who abandon are significantly less likely to offend than the first group, then that constitutes one powerful reason to punish them less than members of the first group, even if they are significantly more likely to offend than members of the undifferentiated public.

D. *Conclusion Re: Desirability of Renunciation Defense*

We found that the culpability principle does not require a full renunciation defense because a renunciation cannot truly negate the culpable act of forming the intent to commit an offense. However, a valid renunciation does significantly diminish any retributive rationale for punishment. In terms of influencing conduct, we determined that the renunciation defense will virtually never serve as an effective incentive to desist from commission of target offenses. Moreover, knowledge that a renunciation defense is available may embolden otherwise ambivalent actors. Finally, our considered intuition suggests that abandoning attempters are significantly less dangerous than non-abandoning attempters.

What is the net result of our analyses? Unfortunately, the final scorecard is messy. There are two reasons to recognize renunciation to some degree at some level (diminution in retributive and incapacitation value); there is one reason not to recognize it at all (reduction in deterrent effect). In order to decide whether renunciation ought to be recognized in some form, we must weigh these considerations against one another. Unfortunately, I am unaware of any intellectually satisfying way to place these considerations on a single metric. We must again

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the assumption that she would be paid later. If this was a failure-type attempt, then no abandonment defense should have been available.

turn to our considered intuitions, and I fully acknowledge that my intuitions on this matter may differ from those of others. Therefore, the following portion of my argument is wholly severable from the preceding analyses.

V. HOW RENUNCIATIONS SHOULD BE RECOGNIZED

I would argue that renunciation ought to be recognized for all attempt-like crimes, but at the grading or sentencing stage rather than at the guilt stage. Assuming for the sake of argument that retribution is a valid rationale for punishing, our thirst for it is considerably diminished when an attempter renounces. One who renounces an inchoate crime probably provokes less social desire for retribution than, say, a murderer who merely feels remorse. Our retributive feelings run not only toward culpable states of mind, but toward socially harmful results.[105] A truly remorseful murderer may not stir much anger in the community on the basis of his wicked state of mind, but there will still be strong feelings that he must "pay" for the life lost. In the case of the attempter who abandons, there is no social harm for which to pay.

Something similar can be said about dangerousness. Attempters who renounce are almost certainly less dangerous than attempters who go through with their target offenses, but are probably more dangerous than members of the public at large. Thus, the relatively moderate dangerousness of abandoning attempters provides a warrant for some reduced degree of incapacitation. In a different constitutional and technological world, we might decide to release abandoning attempters on the condition that they be watched closely and constantly. Under prevailing law, however, such a solution poses serious privacy problems, and most of us would have little confidence in such monitoring anyway. Given these problems, the best way to reflect the moderate dangerousness of abandoning attempters is to incarcerate them for lesser terms than non-abandoning attempters.

This leaves the problem of diminished deterrence. There is not much I can say to those who believe that general deterrence is the be-all and end-all of the criminal law. Common sense suggests that reduced punishments for abandoners may well influence a few actors to

105. *See* Kevin Cole, *Killings During Crime: Toward a Discriminatory Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73 (1990) (explaining harm-based retributivism). I wish to emphasize that I am not endorsing harm-based retribution—or any kind of retribution—as a valid reason for punishing. I discuss retribution because I recognize it as a widely-accepted societal notion.

take steps toward crime. I find some solace in the money-back guarantee analogy: All marketers know that a partial refund isn't nearly as effective as a complete refund. There is something about human psychology that makes us perceive a radical difference between no risk and even a small amount of risk. Those who are truly torn between abiding by the law and starting down the road to crime—those truly in equipoise—may view renunciation as the tie-breaker in favor of starting down the road. But most will probably view a reduction in incarceration as a sort of booby prize. For a prospective first-time offender, at least, the big difference is between no incarceration and any incarceration at all. If such a prospective offender has serious doubts about whether he can get away with the crime, offering even an 80 or 90 percent reduction in prison time will not make him much bolder.

The law should recognize renunciation, then, but not as a full defense. If not as a full defense, should renunciation be recognized at the grading or sentencing stage? The answer depends on whether the relevant jurisdiction has a determinate or indeterminate system of sentencing. Jurisdictions that have indeterminate sentencing could enact a separate offense called "Renounced Attempt." The statute would say something like: "Any person guilty of an interruption-type attempt shall be convicted of a renounced attempt rather than an attempt if such person desisted from the target offense in a manner that indicates a complete and voluntary renunciation of criminal purpose."

In the typical case, a prosecutor would charge a regular attempt, the defendant would come forward with at least some evidence of a renunciation, and the jury would be instructed that it is required to find the defendant guilty of a renounced attempt if the defendant in fact renounced. The defendant could be made to prove renunciation by a preponderance of the evidence, or the prosecution could be required to disprove a renunciation beyond a reasonable doubt. The relationship between an attempt conviction and a renounced attempt conviction would be similar to the relationship between murder and voluntary manslaughter; the latter represents a mitigated version of the former.[106] Of course, the same would apply to all attempt-like offenses. A renounced larceny would be a mitigated version of larceny, a renounced burglary would be a mitigated version of burglary, a renounced arson would be a mitigated version of arson, and so on.

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106. *Cf.* MPC § 212.1 (reducing kidnapping to a second-degree felony if the "actor voluntarily releases the victim alive and in a safe place prior to trial").

In jurisdictions with determinate sentencing, renunciations should be taken into account during sentencing. Mandatory mitigation for renunciations could be integrated into the practices of determinate sentencing jurisdictions with relatively little disruption. Consider how the United States Sentencing Guidelines ("USSG") would treat an attempted bank robber who renounces.[107] Suppose *D* dons a mask, procures a firearm, and drives back and forth in front of a bank. At this point, he has a complete and voluntary moral conversion and desists. According to the USSG, the base offense level for robbery is twenty.[108] Because he aimed to take the property of a financial institution, the judge would add two levels.[109] Because *D* was in possession of a firearm, the judge would add five levels.[110] However, because *D* did not "complete[] all the acts [he] believed necessary for successful completion of the substantive offense," and because the circumstances do not "demonstrate that the defendant was about to complete all such acts but for apprehension or interruption by some similar event beyond the defendant's control," the judge would subtract three levels.[111] On the facts of this case, the guidelines essentially mandate a reduction of three levels for *D*'s renunciation.

The preceding guidelines section covers more than just renunciations. Let us suppose that, acting on a tip, the police had caught *D* after he had donned the mask and procured the firearm, but before he had left home. *D* would probably still qualify for the three-level reduction. He did not engage in the last proximate act (in this case, taking property by force or threat). Nor, in all probability, could the government prove that he "was about to complete all such acts" but for the apprehension. There was too much time and too much to do between leaving his house and actually taking the money. The guidelines award a three-level reduction to *D* in this situation merely for the fact that he did not come close to getting the money. The guidelines do not distinguish the true renunciation in our first hypothetical from the early apprehension in our second hypothetical.

Thus, some change in the guidelines would be required to implement my proposal. A separate provision limited to true renunciations would have to mandate a reduction in lieu of the reduction for not

107. *See* U.S. SENTENCING GUIDELINES MANUAL, § 3E1.1 (1995).
108. *See id.* § 2B3.1(a).
109. *See id.* § 2B3.1(b)(1).
110. *See id.* § 2B3.1(b)(2)(C).
111. *Id.* § 2X1.1(b)(1).

coming close to completion. Although reasonable people could certainly differ on the appropriate amount of reduction, I would suggest a one-half reduction in offense levels. In our hypothetical above, *D* would be assigned a final offense level of thirteen (twenty-seven divided by two, rounding down). This compares to the final offense level of twenty-four (twenty-seven minus three) that *D* would get under the present guidelines. So my proposal does call for an alteration of the guidelines, and it would produce substantially different results. But it would not require a structural change in the guidelines' approach.[112]

There is another reason to recognize renunciations during sentencing instead of during the guilt phase of a criminal trial. It puts responsibility for recognition in the hands of judges and probation departments instead of juries. Judges and probation departments are familiar with a broad variety of attempts and attempt-like crimes; they are in a position to assess whatever contrast there may be between this broad run of crimes and the ostensible renunciation in the case at bar. Moreover, juries may not understand why a renunciation should make a difference and may be reluctant to give it its due. Also, a scheme of determinate sentencing stands a better chance of producing uniform treatment than scattered jury determinations.

VI. CONCLUSION

The MPC offers a renunciation defense against attempt prosecutions, but it does not provide a renunciation defense against prosecutions for crimes structurally indistinguishable from attempt, such as burglary, theft by unlawful taking, and certain types of arsons. The MPC offers a renunciation defense against prosecutions brought under the general conspiracy provision, but it does not provide any such defense against prosecutions for specific types of conspiracy, such as agreeing to commit bribery. Even after taking into account the peculiarities of these various offenses, it is clear that there is no warrant for treating them differently from each other with respect to renunciation. A renunciation defense should be provided for all of them or none of them.

The latter choice is the better one. The arguments for and against

112. *See id.* § 2X1.1(a) (covering attempt, solicitation, or conspiracy). Section 2X1.1(a) states: "Base Offense Level: The base offense level from the guideline for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with reasonable certainty."

a renunciation defense are close. After considering retributive, incapacitation, and deterrence factors, it simply is not clear that those who renounce their crimes ought to escape punishment altogether. The better course would be to reduce punishments for those who renounce. In jurisdictions with indeterminate sentencing, this means recognizing mitigated forms of attempt, conspiracy, burglary, and theft in the same way that we recognize voluntary manslaughter as a mitigated form of murder. In jurisdictions with determinate sentencing, it means requiring mandatory mitigation of sentence for those who renounce. When the criminal law uses affirmative defenses to recognize exculpatory factors, it forces all-or-nothing results. Wherever else in the criminal justice system binary results are appropriate, renunciation is not one of those places.